IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 29, 2009

CARRIE ANN BREWSTER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 83837 Mary Beth Leibowitz, Judge

No. E2008-01468-CCA-R3-PC - Filed November 10, 2009

The Petitioner, Carrie Ann Brewster, appeals the Knox County Criminal Court's denial of her petition for post-conviction relief from her convictions for felony murder, especially aggravated robbery, and aggravated burglary. In this appeal, the Petitioner contends that the trial court erred in finding that she received the effective assistance of counsel. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Steve Sams, Knoxville, Tennessee, for the appellant, Carrie Ann Brewster.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leslie Nassios, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The Petitioner and her husband were originally convicted of first degree felony murder, facilitation of first degree premeditated murder, especially aggravated robbery, and especially aggravated burglary. The trial court merged the convictions for first degree murder and facilitation of first degree murder. On appeal, this court modified the conviction for especially aggravated burglary to aggravated burglary and affirmed the convictions as modified. The supreme court denied permission to appeal. State v. Carrie Ann Brewster & William Justin Brewster, No. E2004-00533-CCA-R3-CD, Knox County (Tenn. Crim. App. Apr. 5, 2005), perm. to appeal denied (Tenn. Aug. 22, 2005).

The facts of this matter are set out in this court's opinion on the direct appeal as follows:

At approximately ten o'clock on the evening of June 19, 2002, Michael Atteberry heard two gunshots at the residence of his neighbor, Bobby David Ervin, the victim. Mr. Atteberry saw a slender Caucasian male run out of the victim's house to a red Nissan truck, and a few seconds later, Mr. Atteberry heard three more gunshots. Then, a second person, Caucasian and heavier in build than the first person, ran from the house to the truck. The truck left with dispatch but not hastily. Mr. Atteberry called the police.

When police officers arrived, they found the body of the victim in a recliner chair in the living room. The victim had been beaten with a blunt object, stabbed numerous times with a sharp object, and shot three times with a .357 gun.

The officers found approximately $13,000 in cash in the victim's pants pockets. Behind the recliner, they found two handguns and a large quantity of marijuana and cocaine. The house was unkempt and in disarray; at trial, the parties differed about whether the house had been ransacked. The defendants maintained that the disarray was merely the result of the victim's customary untidiness. A blood smudge was found inside a dresser drawer in the master bedroom, and the locked door to a second bedroom had been kicked in by someone wearing shoes that apparently had tracked through the blood in the living room.

The officers' investigation caused them to look for the husband-and-wife defendants, Carrie Ann Brewster ["CB"] and William Justin Brewster ["JB"]. A detective left his number with JB's mother. Several hours later, a weeping CB called the detective and said, "You're not going to believe me; you're not going to believe me that I killed that man in self-defense." The detective suggested that CB and JB come to the police station.

The defendants arrived at the station in their automobile. The officers interviewed them separately, beginning with CB. She signed a written waiver of her Miranda rights and gave a tape-recorded statement in which she stated that she and JB had killed the victim. Likewise, after also waiving his Miranda rights, JB confessed that he and CB had killed the victim. He admitted that he took $150, a handgun, and some pills from the victim's home. The defendants told the officers that they could find the handgun used in the homicide beneath the front seat in the defendants' car. The officers retrieved the .357 revolver, which through forensic analysis proved to be the

> gun that fired bullets into the victim's neck, chest, and arm. In his pretrial statement, JB admitted that he had obtained the revolver from the rear bedroom in the victim's house.

Id. (footnotes omitted).

The petition for post-conviction relief, as amended, contends that the Petitioner received the ineffective assistance of counsel. She asserts that counsel (1) failed to challenge the admission of crime scene and autopsy photographs of the victim and (2) improperly sought and obtained the admission of a crime scene video depicting the victim's body being removed from the scene.

The only witness testifying at the evidentiary hearing was the petitioner's trial counsel. He testified that it was the joint decision of the petitioner and her husband, who was her co-defendant, that the two would be tried together. Trial counsel explained why the decision was made to offer the crime scene videotape into evidence and its intended value to the defense:

> That was a decision we made after . . . her codefendant refused to testify. Let me back up a little bit. Everything has been built around his testimony, and we were going to put him on and he was going to testify as to this alleged robbery and – trying to knock it down to something such as voluntary or something like that. And when he refused to testify, we got together and decided the only thing we could do at that point would be to try to mitigate as much as we could by putting the video on to show – this house was a very small house. I went out to see it on several occasions. . . .
>
> Q Could you describe the conditions –
>
> A – it was a wreck.
>
> Q – that [the victim] kept the house?
>
> A It was . . . a wreck. . . . [I]t looked like somebody's garage, . . . just kept going with junk piled up everywhere. It was hard to even walk [through] it . . . because there was so much junk and filth and everything else in the house. It's not that it had been ransacked so much. It was just that that's the way [it] looked like he lived.
>
> . . . .
>
> Q And what did he do for a living?

A I don't think that I found out that he ever did anything for a living, other than maybe sell drugs.

Q And did the crime scene video depict a large quantity of drugs in the house?

A It did. There was a separate room with a lock on it that had a bunch of drugs in it.

Q And do you recall drugs and money being located around his body?

A Yes, there was.

. . . .

Q Okay. So is it fair to say that the condition of his house showed that he might not be a very nice, upstanding citizen; is that –

A Correct.

Q Okay.

A The hygiene and the drugs and everything combined.

Q And part of the theory of your – is it correct to . . . summarize that part of your theory of the case was that he was . . . a violent person?

A Yes. I think if I remember correctly there was . . . a gun located behind the chair or somewhere like that.

. . . .

Q And is it fair to say that your client . . . was afraid of him and that was part of your theory that they were in fear of him?

A Exactly. She was very afraid of him.

Q And were you not, in fact, through Mr. Brewster attempting, had he testified, to show that [the victim] may have been the first aggressor in this?

A That's what the testimony would have been, yes.

Q Okay. So – and when he failed to live up to his part of your trial strategy, is it fair to say that you had to modify your trial strategy at that point?

A We did. We met I think – I don't know if we slept then because we went straight through consulting with each other, going over the video, going through everything we needed to do. And it was a real quick decision but a decision we made and we thought we had to.

. . . .

Q And so there was a lot of evidence . . . left at the scene to show that the Brewsters didn't steal all of his money or his dope; . . . is that correct?

A That's correct, yes.

Q All right. And clearly that would have been a defense to the charge of felony murder by robbery in this case?

A It would have been, yes.

On cross-examination, trial counsel further explained the effect that he believed the showing of the videotape would have on the jury:

Q I want to ask you your opinion of the crime scene video. Now, we're lawyers and judges and we see this all the time. Was there ever any discussion between you and co-counsel . . . regarding the graphic nature of . . . this crime scene video?

A Well, . . . part of our decision was that graphically it was such a mess. It was so repulsive as far as the interior of this house and the way . . . this man lived that we wanted to get that out to the jury. . . . We couldn't get it out through the testimony of the codefendant. So we had to do something. And so the next best thing would have been the video.

Q Okay. So do you feel that it was too shocking potentially for the members of the jury?

A I don't think it could have been shocking enough for them. I mean . . . we had to shock them into believing that this is the way this man lived. He was repulsive; he was basically – I hate to say this – but it really was that in some respects . . . he was so despicable that we were hoping that would turn them off to his plight.

Q Turn – you were hoping . . . that the video in its shockingness would turn the jury members off to the victim's plight?

A Plight, yes, towards his death. . . . In other words, maybe this individual was not someone that we really need to have around basically.

By written order, the trial court denied relief to the Petitioner:

In this case the petitioner, Carrie Ann Brewster, by and through counsel, moves for post-conviction relief after a jury trial and conviction of first degree murder. The court acknowledges four (4) of the exhibits, which the court has gone back to the Court of Criminal Appeals and examined. The transcript, video of the crime scene introduced by defense counsel at trial, the crime scene photographs introduced by the state at trial, and the autopsy photographs also introduced by the state at trial.

[The petitioner] and her husband, William Justin Brewster, were tried in a joint trial at the insistence of the defense, a jointly constructed defense, for the reasons testified to by . . . counsel for [the petitioner]. He testified that the defense attorneys determined that a joint trial with Mr. Brewster testifying and [the petitioner] not testifying was in the best interest of their clients. There were a number of reasons given by counsel for this and much of their defense was structured upon the testimony of Mr. Brewster. However, at the last moment[,] Mr. Brewster declined to testify in the trial and the attorneys, who had extensive conversations with him to explain the devastating effect thereof, then introduced the crime scene video as a defense tactic. Their defense was that the victim was a bad man and an evil drug dealer, who was fully armed, and of whom Mr. and Mrs. Brewster were frightened. The victim in this case, Bobby David Ervin, was a grossly obese man whose injuries were extremely extensive. His wounds consisted of beating, stabbing, and gunshots, all of which contributed to his death. [The petitioner] complains that the defense should not have allowed the video of the crime scene, that copies of the crime scene and copies of the autopsy introduced by the

state were overwhelmingly gruesome and therefore prejudiced her case. The crime scene video also showed some of the things that the attorneys had sought to introduce through Mr. Brewster including a number of drugs, guns, the filthy conditions of the home and victim himself. It showed that he was a violent person, and a drug dealer who kept weapons near him. The crime scene video showed all of these things including thirteen thousand dollars ($13,000.00) in money and drugs found under the body, the horrible hygiene the man had, and the multitude of weapons. The theory was that Mr. Ervin was the first aggressor, but because Mr. Brewster refused to testify[,] the attorneys were left with no other choice but to show those scenes.

Further, [the petitioner] complains that the crime scene videos and the autopsy photographs were very gruesome. Her attorney . . . testifie[d] that he met with the District Attorney's Office to go over the photographs and many photographs were omitted so as not to be repetitive or overly gruesome, and a limited number of photographs both of the crime scene and autopsy were introduced. Of course those photographs were introduced prior to the introduction of the crime scene video by the defense, the state declining to introduce the crime scene video itself. Additionally, [defense counsel] testified that the reason the defense was constructed in this manner was that [the petitioner] testified at the preliminary hearing, and was an extremely poor witness who was easily riled, and her testimony would not have contributed to her defense. [The petitioner] determined after Mr. Brewster chose not to testify that she would not testify and that she made that decision according to [defense counsel]. Also both parties were given Momon [v. State, 18 S.W.3d 152 (Tenn. 1999),] rights.

In this case the proof was overwhelming and multiple statements were given by the defendant[s] which were not suppressed after a motion to suppress was denied. Further the defendant[s] tried to hide evidence and fled and attempted to avoid capture. The state argued that the proof was overwhelming in the case and [the petitioner] did attempt to blame Mr. Ervin in her statements but that she had bludgeoned, stabbed and shot him, then hid her bloody clothes and weapon, and attempted to destroy them. Also in her statements to the police and her husband[']s also, they spent the rest of their time prior to their arrest using the drugs that they had taken from Mr. Ervin's house. The state argues that Mr. Ervin was a repulsive man, and that the state was concerned about the angle of the victim as a drug dealer mitigating against it[s] case. The prosecutor argued that she did not show the video because of the disgusting

nature of it, and she was worried that that video might enure to the benefit of Mr. and Mrs. Brewster. She further argued that Doctor Melusnic's chart as well as the photographs supported Dr. Melusnic's testimony. They were no more than necessary to show the many wounds of the victim as presented to the jury in the testimony of Dr. Melusnic as to the cause of death.

Because the issue was raised by the defense that Mr. Ervin was the first aggressor[,] the photographs were a necessary and proper part of the testimony. The state also argues that it was necessary for Dr. Melusnic to testify as to the sequence of the blows and to show that Mr. Ervin was taken unaware and that he was never out of his chair and that the photographs rebutted the first aggressor issue. In the court's opinion [defense counsel] did everything that he could, worked diligently to counsel his client, to examine the physical evidence, to counsel with Dr. Melusnic and the District Attorney's Office, to go over the evidence and do his discovery, and to prepare in every way a defense for[] and a trial for [the petitioner].

None of [the petitioner's] claims rise to the level of failure of counsel in accordance with Strickland v. Washington, 466 U.S. 668, 694 (1984) or Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). [Defense counsel,] a highly experienced lawyer in murder cases[,] constructed as best he could a defense with respect to this case of overwhelming proof. Not only has the [petitioner] not shown a violation of her constitutional right to counsel, she has not shown that there would be any other result arising from post-conviction relief. [The petitioner] and Mr. Brewster made conscious and personal decisions with regard to how the case would go forward and who would testify or not testify, and she is not at this time entitled to post-conviction relief. The petition is therefore respectfully denied.

ANALYSIS

On appeal, the petitioner argues that the trial court erred in finding that trial counsel was not ineffective for putting into evidence a videotape of the crime scene showing "a very physically brutalized victim" and that "showing visually the effects of [the] defendants' very violent conduct [was] more likely to turn the jury's emotions against the defendants rather than in their favor."

The burden in a post-conviction proceeding is on the petitioner to prove her grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's

performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103 (2006).

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. "Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982); see DeCoster, 487 F.2d at 1201.

In this appeal, the Petitioner does not argue that trial counsel, because of lack of preparation or preparedness, asked that the crime scene videotape be played for the jury but, rather, asserts that the showing of the video was both unnecessary and unwise. Thus, her complaint is to counsel's trial strategy. Her proof as to this claim is the fact that she was convicted of the charges. As we have set out, counsel is not ineffective simply for choosing a trial strategy that is unsuccessful. Also, the limited photographs that were admitted into evidence reflecting the victim's wounds were relevant and necessary for the State's case. We conclude that the record supports the post-conviction court's denial of the petition.

CONCLUSION

In consideration of the foregoing and the record as a whole, we affirm the denial of the petition for post-conviction relief.

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JOSEPH M. TIPTON, PRESIDING JUDGE